this intermediate step and limit itself merely to eliminating one class of potential plaintiffs in future antitrust challenges to maximum resale price agreements. Doing so would leave a *per se* rule that virtually no one could credibly enforce. Consumers cannot sue for paying too low a price (for they are not injured in fact), the Justice Department is unlikely to sue because it has publicly and repeatedly stated that it does not agree with the rule in the first place,[2] and distributors who participated willingly in the illegal conspiracy have at best a dubious claim.[3] That leaves as the only plaintiffs the distributors who are suing so that they can be free to charge higher prices to the consumers.[4]

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laws were designed to prevent. In the present case, the aspect of petitioner's conduct that injures respondent is low prices. But low prices are procompetitive—not anticompetitive—absent some showing of predation (which is not in issue here). The only thing preventing respondent from charging higher prices (and providing more services) is market competition itself in the form of consumer preference: If consumers prefer the services respondent offers to the lower prices offered by petitioner, then respondent will succeed in the marketplace; if it fails, it will be because it has made an error in judging what consumers demand—not because its rivals were forced to charge lower prices.

[2] *See, e.g., Monsanto Co. v. Spray-Rite Serv. Corp.*, Brief for the United States as Amicus Curiae, at 19-20.

[3] Although the Court rejected an *in pari delicto* defense in *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 214 (1951), it did so where the alleged wrongdoing of the plaintiff was not the very basis on which the plaintiff was proceeding. And in *Perma Life Mufflers, Inc. v. Int'l Parts Corp.*, 392 U.S. 134, 139 (1968), the Court permitted a conspirator to sue another conspirator only as a private attorney general in a situation where it was clear that there were third parties (in that case, consumers) who were suffering antitrust injury from the alleged wrongdoing.

[4] *Cf. Albrecht* 390 U.S. at 162 (Harlan, J., dissenting) (discussing the difficulty in finding a "combination or conspiracy" in a vertical maximum price agreement).

Rather than abide this result, the Court should reexamine the underlying law that creates this anomaly.[5] The obstacle to this Court's frank reassessment of the wisdom of a *per se* rule against vertical agreements setting price ceilings is, of course, the 1968 ruling in *Albrecht*. This Court does not lightly overrule such precedent.[6] Quite apart from the disturbing lack of credible plaintiffs to enforce the *Albrecht* rule, however, there are three reasons why the Court should examine anew whether vertical agreements setting price ceilings should be unlawful *per se*.

First, the rationale given in *Albrecht* in support of the *per se* rule has been substantially undermined by subsequent Court decisions, a circumstance that in the past has caused the Court to reverse precedent.[7] The primary justification given in *Albrecht* for imposition of a *per se* ban on price ceilings was that such vertical

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[5] Although the issue on which this Court granted certiorari in this case was respondent's antitrust standing, this does not prevent this Court from reaching the broader question whether *Albrecht* should be overruled. This issue was explicitly considered by both the majority and dissent below, although the court appreciated that it was without power to overrule Supreme Court precedent. *See USA Petroleum Co. v. Atlantic Richfield Co.*, 859 F.2d 687, 696 (9th Cir. 1988); *id.* at 700-01 & n.5 (Alarcon, J., dissenting). Similarly, both petitioner and respondent discuss the continued viability of *Albrecht* in the petition and opposition. *See* Petition for a Writ of Certiorari, at 14-15 & n.5; Respondent's Brief in Opposition, at 8 n.9. Moreover, this Court is free to address issues even where they are not raised or argued by the parties. *See Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 697 (1984); *Blonder-Tongue Laboratories, Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 319-21 (1971). *See generally* R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* § 6.26 (6th ed. 1986).

[6] *See, e.g., Patterson v. McLean Credit Union*, 57 U.S.L.W. 4705, 4707 (1989); *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984); *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977).

[7] *See, e.g., Helvering v. Hallock*, 309 U.S. 106, 119 (1940).

agreements "by substituting the perhaps erroneous judgment of a seller for the forces of the competitive market, may severely intrude upon the ability of buyers to compete and survive in that market."[8] Whatever force this rationale may originally have had (given the fact that suppliers have little incentive to drive their own distributors out of business) was eliminated by this Court's decision in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977). In that case, the Court upheld the power of suppliers to specify geographical areas in which their distributors would have to contain their efforts regardless of what independent judgment the distributors might make about what best facilitated their competitive efforts. In so doing, this Court implicitly recognized that the freedom of distributors to compete as they like must yield to the overriding consideration of what best facilitates overall competition and efficiency in delivering goods and services to the public.[9] This same reasoning applies with equal force to agreements setting price ceilings for resale.[10]

[8] *Albrecht*, 390 U.S. at 152. *See also Kiefer-Stewart*, 340 U.S. at 213 (vertical price ceiling agreements "cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment").

[9] Indeed, Justice White, who wrote for the Court in *Albrecht*, recognized that the Court's decision in *GTE Sylvania* was fundamentally inconsistent with the freedom of traders rationale underlying *Albrecht*. *See GTE Sylvania*, 433 U.S. at 67-68 (White, J., concurring in the judgment).

[10] The Court in *Albrecht* also suggested that vertical price ceiling agreements should be made *per se* unlawful because, "if the actual price charged under a maximum price scheme is nearly always the fixed maximum price, which is increasingly likely as the maximum price approaches the actual cost of the dealer, the scheme tends to acquire all the attributes of an arrangement fixing minimum prices." *Albrecht*, 390 U.S. at 153. But the possibility that a vertical agreement fixing minimum resale prices might be masqueraded in some circumstances as a price ceiling is no reason to prohibit all price ceilings. Practices ruled *per se* illegal must be manifestly anticompetitive. Indirect harms are properly dealt with under a rule of reason where antitrust plaintiffs must show that in the particular circumstances of its case, the explicit agreement to set a price ceiling acted as an implicit agreement to set a specific resale price and thereby comes within the existing *per se* rule on resale price maintenance. *See Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984).

Second, the doctrine of *stare decisis* applies with less force to determinations of mixed questions of fact and law. The Court has always been open to "lessons of experience." *See Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 407 (1932) (Brandeis, J., dissenting). This readiness to reconsider decisions based upon factual premises applies with special force to this case. The operations of markets and the effects of new business practices are outside the normal area of judicial expertise. This Court's own opinions stress the importance of considering the practical effects and the need for "considerable experience with [such] business relationships," *United States v. Topco Associates, Inc.*, 405 U.S. 596, 607-08 (1972), before finding a practice *per se* illegal.

Third, *Albrecht* has been "the subject of continuing controversy and confusion both in the scholarly journals and in the federal courts."[11] Leading antitrust scholars have written sharp criticisms of the *per se* rule.[12] And several lower courts, considering the practical effects of

[11] *GTE Sylvania*, 433 U.S. at 47.

[12] *See, e.g.*, P. Areeda & H. Hovenkamp, *Antitrust Law*, ¶ 340.3.b n.24 (Supp. 1988) ("Supplier regulation of the *maximum* prices charged by the dealers is virtually never anticompetitive") (emphasis in original); Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division II*, 75 Yale L.J. 373, 464 (1966) ("Because there is no danger of a restriction of output but rather the likelihood of an increase," the law should allow maximum resale price agreements); Easterbrook, *Maximum Price Fixing*, 48 U. Chi. L. Rev. 886, 887 (1981) ("[M]aximum price fixing is almost always beneficial to consumers"); Hovenkamp, *Vertical Integration by the Newspaper Monopolist*, 69 Iowa L. Rev. 451, 452 (1984) (*Albrecht* "effectively gave legal protection to the

vertical maximum price fixing, have been at a loss to identify any competitive harm.[13] In such circumstances, this Court should be willing to go beyond its usual def-

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pricing activities of a natural monopolist"); Turner, *The Durability, Relevance, and Future of American Antitrust Policy*, 75 Calif. L. Rev. 797, 803 (1987) (The Court should "reverse *Albrecht v. Herald Co.* and allow producers to couple beneficial territorial and customer restrictions with vertical maximum resale price restraints") (footnote omitted); *see also* R. Bork, *The Antitrust Paradox* 438-39 (1978); H. Hovenkamp, *Economics and Federal Antitrust Law* 247-72 (1985); Baysinger & Butler, *Vertical Restraints of Trade as Contractual Integration: A Synthesis of Relational Contracting Theory, Transaction-Cost Economics, and Organization Theory*, 32 Emory L.J. 1010, 1077-84 (1983); Blair & Fesmire, *Maximum Price Fixing and the Goals of Antitrust*, 37 Syracuse L. Rev. 43 (1986); Blair & Shafer, *Evolutionary Models of Legal Change and the* Albrecht *Rule*, 32 Antitrust Bull. 989 (1987); Boudin, *Antitrust Doctrine and the Sway of Metaphor*, 75 Geo. L.J. 395, 411-12 (1986); Friedman, *Antitrust Analysis and Bilateral Monopoly*, 1986 Wis. L. Rev. 873, 885-86; Halligan, GTE Sylvania: *The Case for Overruling* Albrecht v. Herald Co., 39 Ohio St. L. Rev. 496 (1978); Handler, *Reforming the Antitrust Laws*, 82 Colum. L. Rev. 1287, 1301-07 (1982); Page, *The Scope of Liability for Antitrust Violations*, 37 Stan. L. Rev. 1445, 1469 (1985); Popofsky, *Resale Price Restraints Revisited*, 49 Antitrust L.J. 109, 116 (1980); *cf.* Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. Chi. L. Rev. 6 (1981) (criticizing application of *per se* rule to vertical restraints).

[13] Both the Fifth and Ninth Circuits have found in particular cases that distributors suffered no more than nominal harm from vertically-imposed price ceilings. *See Kestenbaum v. Falstaff Brewing Corp.*, 575 F.2d 564, 570 (5th Cir. 1978), *cert. denied*, 440 U.S. 909 (1979) (distributor denied recovery for profits lost because of inability to raise prices in concert with other dealers); *Knutson v. Daily Review, Inc.*, 664 F.2d 1120 (9th Cir. 1981) (upholding award of $3 to distributors). The Seventh Circuit has found that competitors do not suffer antitrust injury from price ceilings. *See Indiana Grocery, Inc. v. Super Valu Stores, Inc.*, 864 F.2d 1409 (7th Cir. 1989); *Jack Walters & Sons Corp. v. Morton Bldg., Inc.*, 737 F.2d 698, 708-09 (7th Cir.), *cert. denied*, 469 U.S. 1018 (1984).

erence to *stare decisis* and reconsider whether *Albrecht* should continue to govern conduct that fundamentally increases output and lowers prices.

II. Vertical Agreements Imposing Price Ceilings on Distributors Should Be Judged According to the Rule of Reason.

The general rule under Section 1 of the Sherman Act is that all relevant facts should be considered in determining whether, on balance, a challenged agreement is "in restraint of trade."[14] It is only where particular conduct can be confidently judged to be "manifestly anticompetitive" based on past experience that the courts will adopt a conclusive presumption of illegality under Section 1.[15]

In the case of vertical agreements setting price ceilings, this Court adopted a *per se* rule almost forty years ago based, not on past experience with the actual effects of such agreements on competition, but rather on its perception that such agreements are not competitively different from horizontal or vertical price fixing.[16] In truth, however, vertical agreements setting maximum resale prices are profoundly different in their purpose, nature, and effect.

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[14] *See GTE Sylvania*, 433 U.S. at 49.

[15] *Id.* at 50. *See Arizona v. Maricopa County Medical Soc'y.*, 457 U.S. 332, 344 (1982); *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958) ("there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use").

[16] *See Kiefer-Stewart*, 340 U.S. at 213 ("no less than those to fix minimum prices, [vertical price ceiling agreements] cripple the freedom of traders"). *See also Albrecht*, 390 U.S. at 152 (quoting the same passage from *Kiefer-Stewart*).

Horizontal price fixing agreements are by their very nature antithetical to competition in the marketplace. Their only purpose is to shield sellers from competitive pressures that would otherwise drive prices downward to the benefit of consumers.[17] Similarly, vertical price fixing agreements, although somewhat more ambiguous in their purpose, may "facilitate cartelizing" by making it easier for competing suppliers to raise prices in concert and to enforce a horizontal price fixing agreement, thus forcing consumers to pay more than they would in a truly competitive market.[18] As such, these price fixing agreements are the sorts of conduct that the antitrust laws, and Section 1 of the Sherman Act in particular, were intended to proscribe.

The situation with respect to vertical agreements establishing price ceilings, however, is fundamentally different. Neither the distributors nor the suppliers who enter into such agreements can do so for the purpose of avoiding price competition, since enforcing the agreements puts more, rather than less, competitive pressure

[17] *See, e.g., United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940). Horizontal maximum price fixing—a practice *per se* unlawful under this Court's decision in *Arizona v. Maricopa County*—also has significant anticompetitive effects. If the price is set too low, it acts as a barrier to entry; if set too high, horizontal maximum price agreements can easily develop into *de facto* minimum price fixing agreements. Because suppliers (unlike horizontal competitors) have no incentive either to deter entry at the distribution level or to establish uniformly high resale prices among their distributors, this Court need not re-address horizontal maximum price agreements in considering whether vertical agreements setting price ceilings should continue to be *per se* unlawful.

[18] *See Business Elecs. Corp. v. Sharp Elecs. Corp.*, 108 S. Ct. 1515, 1520 (1988) (*quoting GTE Sylvania*, 433 U.S. at 51 n.18 (*quoting* Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions*, 75 Colum. L. Rev. 282, 294 (1975))).

on rivals. Indeed, normally one would expect there to be no need for suppliers to limit how high a price their distributors can charge, as competitive pressures from distributors of other products (or from other distributors of the same product) would make it impossible for distributors to charge more than a competitive price. The purpose underlying vertical price ceiling agreements, therefore, is not to avoid the discipline competition imposes on pricing to consumers, but rather to provide some substitute for such discipline in markets where distributors are *not* subject to normal competitive pressures to keep resale prices down.[19] In such markets, suppliers seek price ceilings in order to protect their interests in maximizing the volume of sales to consumers (and, correspondingly, the suppliers' revenues)—the very motives recognized as procompetitive by this Court in *GTE Sylvania*.[20]

The newspaper markets served by members of *amicus* are examples of markets where vertically imposed price ceilings would be procompetitive. Two important aspects of the newspaper business make such ceilings necessary if the product is to be distributed through sale and resale:

- First, the nature of the newspaper business is such that, if marketing is to be done through sale and resale, distributors must serve defined geographic territories [21] to ensure that they deliver to all readers (rather than merely compete for the readers

[19] *See, e.g.*, 3 P. Areeda & D. Turner, *Antitrust Law* ¶ 734 (1978).

[20] *See GTE Sylvania*, 433 U.S. at 56 & n.24.

[21] Though publishers normally do not grant exclusive territorial distributorships, the newspaper market is such that each area will naturally be served by only one carrier. *See* Hovenkamp, *supra* note 12, at 452-53.

who can be serviced most conveniently) and provide satisfactory service to customers.[22]

- Second, newspaper publishers generally receive about 75% of their revenues from advertisers who pay for space in the newspapers based on the number of newspapers sold.[23] As a result, distributors who purchase newspapers for resale (and receive revenue only through such sales) do not have the same incentives as newspaper publishers to maximize circulation by keeping prices low.[24]

The combination of these two characteristics of the newspaper industry severely limits newspaper publishers' choices as to how their papers will be distributed. If publishers were to sell through distributors who did not have defined geographic territories, circulation would go down because distributors might well compete with each other only for a smaller group of customers. If they sold to distributors who had defined territories, but without putting any limits on the prices the distributors could charge to consumers, then each distributor would have the power to raise prices to consumers and thereby reap monopoly profits.[25]

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[22] Because subscribers typically complain to the publishers about delivery problems, the publishers must be able to hold a particular distributor accountable in order to maintain subscriber goodwill.

[23] *Id.* at 454-56.

[24] If left to its own devices, the distributor might derive more total revenue from selling the papers to fewer subscribers at higher prices.

[25] *See id.* at 452-454. Newspapers generally are facing increased competition in the marketplace. Direct mail advertising, suburban publications, weeklies, free-circulation shoppers and other forms of print all compete with the major daily newspapers for the advertising dollars that form the great bulk of newspaper revenues. Other media, such as television, radio, and billboards, also are formidable competitors. But this stiff competition for the advertising dollar does not effectively limit a distributors' ability to raise prices to subscribers within their geographic territories,

Thus, the experience of the newspaper industry illustrates that the purpose of vertical price ceilings is not to escape competition but rather to compensate for the lack of it.[26] A supplier generally seeks such agreements to protect itself from distributors who would otherwise raise prices and reap monopoly profits, thereby decreasing the supplier's sales and revenue. Though the supplier's purpose may not be altruistic, the direct effects of vertical price ceilings promote consumer welfare by lowering the prices consumers pay.

Thus, direct and tangible benefits flow from vertical maximum price agreements. By contrast, the possibility that such agreements may lead to harm is only indirect and speculative.[27] It cannot be said, therefore, that vertical price ceilings are manifestly anticompetitive or that they have the significant "pernicious effect on competition" that *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 5 (1958), requires for a rule of *per se* illegality. Following well-established antitrust law principles, therefore, vertical agreements setting maximum resale prices should be judged according to the rule of reason.

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distributors have market power over the resale price of the newspapers themselves. *See id.* at 452 ("A newspaper delivery route is often a natural monopoly").

[26] Academic commentators have noted that this experience is not limited to the newspaper industry. *See, e.g.*, Blair & Shafer, *supra* note 12, at 995-1000.

[27] See *supra* note 10.

CONCLUSION

The experience since *Albrecht* was decided, the weight of scholarly opinion, and developments in antitrust doctrine as set forth by this Court all show that a continued *per se* prohibition on vertical price ceilings has no justification in fact or law. Whether a sale and resale system would be more efficient than the substitutes that have largely replaced it since *Albrecht* should be tested in the marketplace, without the intervention of artificial legal rules that serve no sensible purpose.

Respectfully submitted,

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August 3, 1989

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MOTION

(8)

No. 88-1668

In the

Supreme Court of the United States

October Term, 1989

ATLANTIC RICHFIELD COMPANY,
Petitioner,

v.

USA PETROLEUM COMPANY,

Respondent.

On Writ of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

Motion For Leave To File Amicus Curiae Brief And Amicus Brief Of Service Station Dealers of America In Support of Respondant

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September 20, 1989

36 PP

MOTION OF SERVICE STATION DEALERS OF AMERICA FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF

Pursuant to Rule 36 of the Rules of this Court, the Service Station Dealers of America moves this Court for Leave to File an Amicus Curiae Brief. Leave to File was obtained from Counsel for Respondant, however Leave to File was sought, but not obtained from Counsel for Petitioner.

INTEREST OF AMICUS

The SSDA is uniquely postured in this case. It is the voice of America's 60,000 independent gasoline retailers. It consists of 43 state and regional dealer associations. SSDA has several interests in this case.

On the one hand, Arco dealers, presumably members of SSDA affiliates, are charged with conspiring with the Petitioner to fix maximum retail prices. On the other hand, the compelling interests of the

thousands of SSDA's other members, compel SSDA to support Respondant.

Resolution of this case requires the Court to definitively address the issue of what the goals of the antitrust laws are,and whether their is only one goal:promotion of economic efficiency.

By virtue of the arguments raised by Petitioner and the United States, the Court may also address questions such as the definition of "predatory practices";whether a showing of market power is necessary to a showing of antitrust injury; and whether the antitrust laws are concerned with intrabrand competition.

Unlike the briefs of the parties, the SSDA brief extensively discusses the original legislative history of the Sherman Act and other antitrust laws.

The need of a gasoline retailer to control his or her price is particulary compelling because control over the pricing

decision is the central test used by courts in determining whether a retailer is protected against termination or non-renewal of his or her franchise relationship by the federal Petroleum Marketing Practices Act, 15 USC 2801 et.seq.

Given these unique interests,SSDA believes it must participate in this case.

Respectfully submitted,

Dimitri G. Daskalopoulos

Dimitri G. Daskalopoulos

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INTEREST OF THE AMICUS

The SSDA is the voice of America's 60,000 independent gasoline retailers.

To a gasoline retailer, no right is more precious than the right to control one's retail price, and that control over price has been held to determine whether one is entitled to the protections of the Petroleum Marketing Practices Act. 15 USC 2801 et. seq. This decision squarely implicates that right.

Though, Arco dealers, presumably SSDA members, are implicated as defendants in this case, SSDA must support Respondants.

Resolution of this case requires the Court to definitively address the issues of the goals of the antitrust laws and to state whether those laws apply to intrabrand competition; guarantee the

competitive freedom of gasoline dealers, and whether we have standing to bring antitrust cases.

According, our brief is extensively devoted to the legislative history and policies behind the enactment of the antitrust laws, and is greatly dissimilar from those of the parties.

SUMMARY OF ARGUMENT

1. The antitrust laws have a variety of goals, including ensuring equality of competitive opportunity, and these goals are not limited to enhancing neoclassical economic efficiency.
2. Congress specifically condemned vertical price fixing, including maximum vertical price fixing, in the history of the Sherman Act.
3. Predatory practices include more than predatory pricing, and should be defined by this Court.
4. The _per se_ rule against vertical maximum price fixing should be retained.
5. Even if the court does reverse the 9th Circuit, it should reject the 7th Circuit opinion in _Jack Walters_.

ARGUMENT

I. THE ANTITRUST LAWS HAVE SEVERAL GOALS, GOALS NOT LIMITED TO THE NEOCLASSICAL DEFINITION OF "CONSUMER WELFARE"

The issue framed by the Petitioner is whether by virtue of a "non-predatory" maximum price fixing, an antitrust plaintiff may demonstrate "antitrust injury."

This inquiry necessitates a thorough discussion of the goals of the antitrust laws. As Professor Areeda explained:

> "The essential point of Brunswick, which gave the name 'antitrust injury' to the doctrine we are examining was that a private plaintiff must show more than a causal connection between the alleged violation and his injury' he must show that the 'injury is of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants acts unlawful.' (Citing Brunswick). This test forces antitrust courts to connect the injury claimed to the

purposes of the antitrust laws. (See, Areeda & Hovencamp, Antitrust, 1988 Supplement Para. 334.2).

The decisions of this Court, as well as the legislative history of the various antitrust laws address this issue.

A. Prior Decisions of This Court

In one of the first decisions rendered by this Court interpreting the Sherman Act, the issue of the goals of the Act was clearly addressed.

In United States v. Trans-Missouri Freight Association 166U.S. 290 (1897); the Court stated:

> "Trade or commerce under [circumstance of artificially reduced prices] may nevertheless be badly and unfortunately restrained by driving out of business the small dealers and worthy men whose lives have been spent therein, and who might be unable to readjust themselves to their altered surroundings. Mere reduction in the price of the commodity dealt in might be dearly paid for by the ruin

of such a class, and the absorption of control over one commodity by an all powerful combination of capital." 166 U.S. at 323-324.

In Charles A. Ramsey v. Associated Bill Posters 260 U.S. 501, 512 (1922), this Court held that:

> "The fundamental purpose of the Sherman Act was to assure equality of opportunity and to protect the public against evils commonly incident to the destruction of competition through monopolies and competition in restraint of trade." 260 U.S. at 512.

In Appalachian Coals, Inc. v. United States 288 U.S. 344 (1933), the Court summarized the goals of the Sherman Act as the prevention of "undue restraints of interstate commerce," the maintenance of "appropriate freedom" of interstate commerce, and to afford protection from the subversive or coercive influences of monopolistic behavior, while characterizing the Act as "a charter of freedom."

The classic statement of the philosophy

underlying the Act was stated by Justice Black in Northern Pacific Railway v. United States 356 U.S. 1 (1958) at p. 4.

> "The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is competition."

Most recently, in Business Electronics v. Sharp Electronics US (1988), the Court noted that *per se* illegality of non-price vertical restraints would create incentive for vertical integration by manufacturers, hardly

conducive to the antitrust goal of fostering creation and maintenance of small business.

It has been argued that in Reiter v. Sonotone Corp. 442 U.S. 330 (1979), the Court adopted the neo-classical concept of "consumer welfare" (and effectively overruled a long line of decisions to the contrary) as the sole goal of the antitrust laws by virtue of a single line in the opinion stating that the history suggests that Congress designed the Sherman Act as 'a consumer welfare prescription.'

Even a cursory reading of that opinion demonstrates that Chief Justice Burger was concerned with a wealth transfer from the consumer-petitioner to the antitrust violator-respondant; noting that the petitioner alleged a wrongful deprivation of her money because the price of the hearing aid she bought was artificially inflated by reason of respondant's anticompetitive conduct. 442 U.S. at 339-43.

Thus, even where the Court has mentioned the term "consumer welfare" as an antitrust goal, it has not adopted the counterintuitive

definition of that term urged upon the Court by Petitioner and the United States as Amicus.

The definition of the term "consumer welfare" urged upon this Court as the sole goal of the antitrust laws, is as a term of art requiring the "maximization of wealth or consumer want satisfaction" Bork, Legislative Intent and The Policy of the Sherman Act. 9 J.L. and Econ. 7. This concept requires a court to distinguish between agreements or activities that increase wealth through efficiency and those that decrease it through restriction of output, and to condemn only the latter. The fact that an agreement or activity may result in an income distribution from consumers to the beneficiaries of the restraint is of no consequence under this view so long as total output or "wealth" is not lessened.

Amicus believes that should this Court adopt the "consumer welfare" rubric as the sole goal of the antitrust laws, it must define what it means by "consumer welfare."

The "efficiency uber alles" interpretation

simply is not supported either by the decisions of this Court, or by the legislative history of the Acts.

Even if one adopts the view that Congress adopted economics as the "North Star" to guide our journey through the antitrust laws, clearly, the economics guiding Congress of 1890 were not that of the yet undiscovered neoclasical school, rather populist concerns such as wealth transfers from consumers to producers were clearly at the forefront of Congressional thinking. See generally, Lande, Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged, 34 Hastings Law Journal 66 (1982).

Under the definition of "consumer welfare" urged herein, it matters not one iota whether real consumers are better off, if producers pocket the surplus, that is just fine. This reading is inconsistent with both precedent, and the legislative history.

B. The Legislative History

As noted by Professor Hovenkamp, a self-described admirer of the "Chicago School" of antitrust analysis:

> "The legislative histories of the various antitrust laws fail to exhibit anything resembling a dominant concern for economic efficiency." Hovenkamp, Antitrust Policy After Chicago, 84 Mich. L. Rev. 213, 249 (1985)

With the exception of Judge Bork, no commentator, either before or after his study, has accepted the view that antitrust's sole goal as "the effort to improve allocative efficiency without impairing productive efficiency so greatly as to produce either no gain or a net loss in 'consumer welfare'." See, e.g., Carstensen, Antitrust Law and the Paradigm of Industrial Organization, 16 U.C. Davis L. Rev. 487 (1983); Fox, The Modernization of Antitrust: A New Equilibrium, 66 Cornell L. Rev. 1140 (1981); Fox, The Politics of Law and Economics In Judicial

Decision Making: Antitrust As a Window, 61 NYU L. Rev. 554 (1986); Lande, Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretatins Challenged, 34 Hastings L.J. 65 (1982); May, Antitrust Practice in the Formative Era: The Constitutional and Conceptual Reach of State Antitrust Law, 1880-1918, 13 U.Pa.L.Rev. 495 (1987); Orland, The Paradox In Bork's Antitrust Paradox, 9 Cardozo L. Rev. 115 (1987); Pitofsky The Political Content of Antitrust, 127 U.Pa. L.Rev. 1052 (1979); Rowe, The Decline of Antitrust and the Delusion of Models: The Faustian Pact of Law and Economics, 72 Geo. L.J. 1511 (1984) Schwartz, "Justice" and Other Non-Economic Goals fo Antitrust, 127 U.Pa. L. Rev. 1076 (1979); M. Sklar, The Sherman Antitrust Act and the Corporate Reconstruction of American Capitalism, 1890-1914, in Corporations and Society: Power and Responsibility 65 (W. Samuels & A. Miler eds. 1987) Symposium, The Economic, Political and Social Goals of Antitrust Policy, 125 U.Pa. L.

Rev. 1182 (1977). Significant studies of the legislative histories of the antitrust laws made prior to Judge Bork's study in 1966 failed to uncover any evidence which could be interpreted as supporting Judge Bork's neo-classical twist on the intent of Congress. See, W. Letwin, Law and Economic Policy: The Evolution of the Sherman Antitrust Act (1966); H. Thorelli, The Federal Antitrust Policy--Organization of an American Tradition (1954); Limbaugh, Historic Origins of Anti-Trust Legislation, 18 Mo. L.Rev. 215 (1953).

A reading of the debate over the Sherman Act reveals that the Congress did not condemn trust because they were not efficient, rather, it saw them as an artificial creation resulting in a denial of equality of opportunity to individuals in the economic sphere, unfair or unjust wealth transfers from consumers to the owners of the trusts, the creation of undue political power, and undermining of the competitive process.

A reading of Senator Sherman's remarks in the

context of the social, political, and economic views of the day indicates he was using the concept of "competition" in a broader political sense of competition being a process to which every individual was entitled in the economic sphere. See his remarks at 20 Cong. Rec. 1167 (50th Cong. 1889) bill adopts the common law; 21 Cong. Rec. 2456 (51st Cong. 1890); deals with "combinations that affect the industrial liberty of citizens," Id. at 2457; rights to form combinations in form of corporation should "be open to all upon the same terms and conditions," Id. at 2457. "It is the right of every man to work, labor and produce in any lawful vocation and to transport his production on equal terms and conditions and under like circumstances. This is industrial liberty and lies at the foundation of the quality of all rights and privileges." 21 Cong. Rec. 2457 (51st Cong. 1890).

One consequence of displacing the competitive process was seen as an adverse long term impact on the property rights of consumers by raising

prices because those displacing the process would have as their only motive to increase their profits. "The law of selfishness, uncontrolled by competition, compels it [unlawful combination] to disregard the interest of the consumer." 21 Cong. Rec. 2457 (51st Cong. 1890). The underlying evil in such circumstances were seen as political by Senator Sherman, not economic in the sense which neo-classical theorizing defines the problem: "If the concentrated powers of this combination are intrusted to a single man, it is a kingly prerogative, inconsistent with our form of government. . . . If anything is wrong, this is wrong. If we will not endure a king as a political power we should not endure a king over the production, transportation and sale of any of the necessaries of life. If we would not submit to an emperor we should not submit to an autocrat of trade, with power to prevent competition and to fix the price of any commodity." 21 Cong. Rec. 2457 (51st Cong. 1890); "The popular mind is agitated with

problems that my disturb social order, and among them all none is more threatening than the inequality of condition, of wealth, of opportunity that has grown within a single generation out of the concentration of capital into vast combinations to control production and trade and to break down competition." 21 Cong. Rec. 2460 (51st Cong. 1890).

Senator Sherman's speech accompanying his report of the bill from the Finance Committee clearly indicates that Senator Sherman had no idea of the then undiscovered neo-classical meaning of competition or "consumer welfare" nor respect for the assumption of pre-existing and absolute contract and property rights which underlies the neo-classical model. Instead, Senator Sherman's meaning for "full and fair competition" and "advance the cost to the consumer:" included: to give the courts the means for dealing with "the industrial liberty" of the people; to guarantee "the right of every man to work, labor and produce in any lawful vocation and to transport his productions on

equal terms and conditions and under like circumstances"; this bill does not seek to cripple combinations of capital and labor, the formation of partnerships or of corporations, but only to prevent and control combinations made with a view to prevent competition, or for the restraint of trade, or to increase the profits of the producer at the cost of the consumer;" the bill is aimed at curbing the "law of selfishness, uncontrolled by competition;" to control the "kingly prerogative, inconsistent with our form of government" of concentrated economic power, curbing coerced refusals to deal without regard for whether they were "efficient" or not; and protecting the political power of government by precluding the wielding of undue political power by those possessing economic power denying the competitive process to others.

In direct contrast to the position taken by Senator Sherman and other advocates of the bill, opponents of ths legislation argued against its enactment on the basis that certain

"efficient" practices such as formation of partnerships and corporations (See 21 Cong. Rec. 2605 (51st Cong. 1890), remarks of Sen. Stewart), VERTICAL PRICE FIXING (See 21 Cong., Rec. 5953-56 (51st Cong. 1890) (Remarks of Congressman Morse) and that a policy of no tariffs and a reliance on laissez faire would produce better, more "efficient" results (See 21 Cong. Record 4094 51st Cong. 1890, detailing rejection of a substitute proposal by Cong. Wilson, an opponent of the legislation.)

Amicus could devote far more than the pages allocated by the Rules to this issue. Counsel fully recognizes the time constraints both the Court and its law clerks operate under. However, we urge the Court to read for itself both the legislative history cited herein, as well as the extensive scholarly commentary on the issue of the goals of the antitrust laws.

If the Court is to decide what type of injury the antitrust laws were designed to prevent, it must determine what the goals of those laws are.

Petitioner and the United States would have the Court adopt, without analysis, the position that a narrowly defined concept of "consumer welfare" is all Congress was concerned with. Under this definition, the trusts such as Standard Oil are "consumers" so long as total output is not impaired. Whatever support can be gleaned for this interpretation from the legislative history of the Sherman Act, simply falls apart when the history of the other antitrust laws is taken into account.

As stated by Professor Flynn:

> Just as the "Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics," Lochner v. New York, 198 U.S. 45, 75, 25 S.Ct. 539, 546, 49 L.Ed. 937, 949 (1905) (Holmes, J., dissenting), the Sherman Act does not enact the neo-classical economic model. The most objective study of the congressional goals sought in adopting the Sherman Act found that the leading economists of the day were opposed to the adoption of the Act on the grounds that it constituted an interference with the functioning of the market--the classicist's concept of the market. Congress adopted the statute with a different set of objectives from those contemplated by classical economics: "There are four major historical goals of antitrust, and all should continue to be respected. These are: (1) dispersion of economic power, (2) freedom and opportunity to compete on the merits, (3) satisfaction of consumers, and (4) protection of the competition process as

market governor." Fox, The Modernization of Antitrust: A New Equilibrium, 66 Cornell L.Rev. 1140, 1182 (1982).

In addition to the four goals postulated by Professors Fox and Flynn (or perhaps a better definition of goal (3), consumer satisfaction), we also believe that undue wealth transfers from consumers, as well as from small business, to antitrust violators is a clear goal of the Act. See, Lande, Wealth Transfers, supra.

II. VERTICAL PRICE FIXING OF ALL VARIETIES WAS SPECIFICALLY CONDEMNED BY CONGRESS. THEREFORE INJURY FROM IT SATISFIED THE ANTITRUST INJURY REQUIREMENT.

In enacting the Sherman Act, the history reveals that Congress intended to ban certain practices. One of these practices was vertical price fixing, minimum or maximum.

Indeed, the House Manager of the bill, Congressman Culbertson, specifically cited vertical price fixing as a practice the Sherman Act was intended to outlaw, and Amicus would urge the Court to review his remarks found at 21 Cong. Rec. 4089-90 (51st Cong. 1890).

It is significant to note that enactment of the Sherman Act was opposed on the basis that it would ban vertical price fixing, and overrule the decision in Fowle v. Park 131 U.S. 88 (1889) (upholding vertically imposed territorial divisions for resale of trade secret product and claiming the interpretation that the Act bans vertical price fixing was inconsistent with such decisions. 21 Cong. Rec. 5953-56 (51st Cong. 1890). (Remarks of Congressman Morse.)

The condemnation of price fixing was explicit, unequivocable, and compels affirming the opinion of the court below. See, 21 Cong. Rec. 4100 (51st Cong. 1890): "Some may say that the trusts have made products cheaper, have reduced prices; but if the price of oil, for instance, were reduced to 1 cent a barrel, it would not right the wrong done to the people of this country by the "trusts." (Remarks of Cong. Mason.)

Given the clear intent of Congress to prohibit vertical price fixing, this Court

should decline the invitation to use the "antitrust injury" concept as a procedural barrier to prevent the application of the substantive law.

III. DEFINING PREDATORY PRACTICES

Neither the Petitioner nor the United States takes the position that it is necessary for the Court to define the term "predatory."

That subject could take up an entire brief by itself.

Nevertheless, Amicus believes the Court should note that traditional definitions of "predatory pricing" do not cover the specter of predatory practices the antitrust laws were intended to address.

Predation can occur in many ways, including through strategic behavior, See e.g., Krattenaker and Salop, On Identifying Exclusionary Practices, 96 Yale L.J. 1209 (1986), through abuse of governmental process as detailed by Judge Bork in Chapter 18 of the Antitrust Paradox, and through a maximum price fixing scheme that leaves a rival unable to

recapture costs inflicted upon it by a predator or "predatory costing" for want of a better term.

This is a problem of special concern in the gasoline industry.

The typical gasoline dealer rents his or her station from the major refiner whose gasoline he or she sells. They operate pursuant to a franchise package that includes a bundle of separate agreements.

The primary costs of doing business for a gasoline dealer are: (a) price of product, (b) station rent, (c) labor, and (d) utilities, whose costs are driven up by requirements such as 24 hour operation. Of these costs, the two largest components, and three of the four, are controlled solely by the refiner, who also competes with a dealer at retail through company operated locations.

If the refiner makes a strategic decision to company operate locations currently operated by dealers, it can ensure the demise of those dealers by driving up the costs of doing

business (wholesale gasoline costs and rents), yet by placing a maximum resale price, the dealer would be unable to recoup those costs, and would be economically evicted from the station. clearly, such a result is contrary to the goals of the antitrust laws, which ensure that one will succeed or fail on one's own merits.

We raise this issue to make clear that predatory practices include far more than "predatory pricing" and also to take exception to the implication raised by both petitioner and the United States that in the absence of "market power" one can never show antitrust injury, therefore suit could be maintained by no one.

Neither the decisions of this court, such as FTC v. Indiana Federation of Dentists, 447 U.S. 106 S.Ct. 2007 (1986) (which rejects the market power requirement where the restraint is sufficiently anticompetitive), nor the legislative history of the antitrust laws support such a requirement.

Indeed, when the Justice Department issued its market power based Vertical Restraints Guidelines in 1985, condemnation of them by Congress was swift and unequivocable, and withdrawal of them was called for virtually without dissent.

Whatever the merits of the "Chicago School" approach, it is clear that Congress remains among the unconverted heathen, and it is the will of Congress this Court must implement.

The Court cannot use the procedural device of antitrust injury to effectively overrule substantive law.

IV. THE PER SE RULE

Neither the United States nor the Petitioner address the issue of whether maximum vertical price fixing should be illegal per se.

If the Court desires to address the issue supplementary briefing should be required.

Amicus would express the view that the legislative history is quite clear that if the Court should retreat form the per se rule, that this offense is intended to be judged by strict

antitrust scrutiny, and should be ruled presumptively illegal, allowing a defendant to make a "real world" showing of competitive benefits.

V. JACK WALTERS

The Court presumably granted the petition on the basis of the conflict between the decision of the 7th Circuit in Jack Walters and Sons Corp. v. Morton Building, Inc. 737 F.2d. 698 (7th Cir. 1984).

Amicus believes that this opinion demonstrates the evil of the "antitrust injury" concept being used to prevent application of substantive law.

> "Even consumers would not be able to bring actions under the rule established in Judge Posner's opinion in Jack Walter & Sons Corp. v. Morton Building . . .
>
> ". . . I cannot escape the conclusion that Judge Posner--growing impatient with Congress's or the Supreme Court's refusal to overrule Albrecht--has decided to undertake that task on his own.

"Members of the Chicago School have visions, as do most of us, of the kinds of things that should obtain in a perfect world. The per se rule against resale price maintenance is definitely not among them. That fact justifies arguments, both theoretical and political. but it does not justify taking the matter into one's own hands, no matter how certain we may be that we are right." Hovenkamp, "Chicago and Its Alternatives", 1986 Duke L.J. 1014, 1025-26 (footnote omitted).

We read neither Petitioner's Brief nor the United States to go as far as Jack Walters. The antitrust laws were designed to guarantee the right of retailers to, among other things, determine retail prices, not to codify contractual abuses by powerful suppliers. We urge the Court to disavow this decision, even if it reverses the 9th Circuit.

CONCLUSION

The antitrust laws have many goals, including guarding competition as a process, by among

other things, assuring retailers, the people most familiar with a market, the right to set their own prices.

Too often we have seen the invocation of the phrase, "The antitrust laws protect competition, not competitors" in a manner to disparage actions brought by the very competitors whose existence is <u>necessary</u> to the existence of competition.

This phrase should not become a talisman to be used by antitrust defendants, it is a shorthand way of expressing the antitrust goal of protecting competition as a process.

The Court below was correct in noting:

> "[A conspiracy to fix prices] is a direct displacement of the competitive process of price determination. It is an assumption of power by the proponent of the restraint, denying rights of distributors and consumers to make their own judgments about pricing--a denial of rights guaranteed by the goals of antitrust policy. Congress did not leave to the proponents of such restraints the

authority to determine unilaterally the scope of the contract rights of distributors. Similarly, Congress did not intend the proponents of maximum price fixing to determine what the best price should be for the benefit of the public."

The Respondants clearly showed "antitrust injury!"

The Court should also be aware of the implications of its newfound "antitrust injury" concept. As demonstrated by Jack Walters, it has become a method by which the application of substantive law that a judge does not like can be averted by creating insurmountable procedural barriers.

If this Court disagrees with the substantive antitrust law, or with previous interpretations of the purposes of those laws, it should clearly so state, in order to properly inform future debate.

We believe the opinion below should be affirmed.

Respectfully submitted,

Dimitri G. Daskalopoulos

Dimitri G. Daskalopoulos

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of September, 1989, I mailed, first class postage prepaid, 3 copies of this Motion for Leave to File and Brief Amicus Curiae to: Ronald Redcay;Hughes,Hubbard and Reed,555 So. Flower St.,Los Angeles,CA 90071(Counsel of Record for Petitioner) and to Maxwell M. Blecher,Blecher and Collins,611 W.6th St.,Suite 2800;Los Angeles,CA 90017(Counsel of Record for Respondant). I further certify that all parties required to be served have been served.

Dimitri G.
Councel of Recor

MOTION

(9)

No. 88-1668

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ATLANTIC RICHFIELD COMPANY,
Petitioner,

v.

USA PETROLEUM COMPANY,
Respondent.

MOTION OF SOCIETY OF INDEPENDENT GASOLINE MARKETERS OF AMERICA FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF RESPONDENT USA PETROLEUM COMPANY

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MOTION OF SOCIETY OF INDEPENDENT GASOLINE MARKETERS OF AMERICA FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF RESPONDENT USA PETROLEUM COMPANY

Pursuant to Supreme Court Rule 36.3, the Society of Independent Gasoline Marketers of America (SIGMA) moves for leave to file an *amicus curiae* brief in support of respondent USA Petroleum Company (USA). The consent of the parties to the filing of this brief has been sought. USA consented, but Atlantic Richfield Company (ARCO) did not consent.

SIGMA is the national trade association of the independent motor fuels marketing industry. In 1988, SIGMA's 315 members sold approximately 17 percent of the motor fuels sold in the United States. Over 92 percent of SIGMA's members are engaged in retail gasoline sales. SIGMA members own and operate more than 11,000 branded and unbranded retail outlets and do business in all 50 states.

SIGMA is quite familiar with the events underlying USA's antitrust suit against ARCO. In 1982 ARCO embarked on a strategy designed to squelch the competitive pressure that independent marketers such as USA were putting on ARCO-brand dealers. One component of that strategy was a maximum vertical price-fixing program, whereby ARCO required the independently-owned dealers it supplied to sell at below-market prices, which it subsidized. The purpose of this program was to prevent independent marketers from employing their superior efficiencies to underprice ARCO-brand dealers. During the course of the conspiracy, ARCO-supplied dealers located near stations operated by USA and other independents sold gasoline at prices lower than the wholesale prices paid

by independents. (*See* Joint Appendix ("JA") at 17-18).

ARCO's maximum resale price maintenance program was devastatingly effective. Over a dozen independent marketers in the areas affected by the restraint either sold out, liquidated, or curtailed their operations. Many independent retail stations had to be closed. (JA 15: ¶ 18). Price competition was chilled, as independents learned that to underprice ARCO dealers was to court disaster due to ARCO's ability to fix and subsidize artificially low retail prices.

SIGMA suggests that the Court would benefit from its participation in the briefing of this matter for two reasons. First, SIGMA believes that it is important to dispel the impression left by ARCO's brief that this lawsuit is simply a case of "sour grapes" by a company that suffered losses as a result of legitimate low pricing. ARCO's unlawful conduct seriously injured the entire independent segment of the gasoline marketing industry, and did serious harm to consumers for whom the independents represent a low-price alternative to ARCO and the other major oil companies. Secondly, SIGMA wishes to draw the Court's attention to the adverse consequences that will befall independent marketers and consumers if the Ninth Circuit's decision is reversed. Reversal of the decision below would be taken as a green light by ARCO and the other major oil companies to institute maximum resale price maintenance programs in other markets where they face strong competition from independents.

SIGMA members have no fear of price competition; it is their lifeblood. They cannot survive, however, if ARCO and the other major oil companies are allowed

to render SIGMA members' efficiencies irrelevant by fixing and subsidizing artificially low retail prices at the independently-owned stations they supply.

The proposed brief of SIGMA is attached.

Respectfully submitted,

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BRIEF OF AMICUS CURIAE SOCIETY OF INDEPENDENT GASOLINE MARKETERS OF AMERICA IN SUPPORT OF RESPONDENT USA PETROLEUM COMPANY

The Society of Independent Gasoline Marketers of America (SIGMA) respectfully submits this *amicus curiae* brief in support of respondent USA Petroleum Company.

INTEREST OF AMICUS CURIAE

The Society of Independent Gasoline Marketers of America is a national trade association representing independent marketers of motor fuels. SIGMA's 315 members sell refined petroleum products in all 50 states. In 1988 nearly 17 percent of the 22.7 billion gallons of motor fuels sold in the United States was sold by SIGMA members. SIGMA members own and operate over 11,000 branded and unbranded retail stations nationwide and supply product at wholesale to an additional 13,700 retail outlets.

The independent marketing segment of the motor fuels industry has been described as "the most competitive factor in the industry at the wholesale and retail levels." *Marathon Oil Co. v. Mobil Corp.*, 669 F.2d 378, 383 (6th Cir. 1981), *cert. denied*, 455 U.S. 982 (1982). Although independent marketers rely heavily on the major oil companies for their supplies of product, innovative marketing techniques, tight cost controls, and a strategy emphasizing high-volume, low-cost retail outlets enable independents to compete vigorously with ARCO and the other major oil companies. *See Report of the Federal Trade Commission on Mergers in the Petroleum Industry* 287-89 (1982) (hereinafter "1982 FTC Report").

A federal government study issued in 1982, the same year that ARCO embarked on the course of conduct that is at issue in this case, noted that the major oil companies were responding in several ways to the pricing pressure exerted by the independents. Some of the major oil companies eliminated credit card sales or adopted differential prices for credit and cash purchases, some shifted to using more self-serve pumps, some sold or closed lower volume, higher cost stations, and some took measures to reduce overhead costs. *1982 FTC Report*, at 289. ARCO chose a different route. In the spring of 1982, ARCO instituted a vertical price-fixing scheme involving its branded independent dealers. ARCO fixed the resale prices of ARCO-brand dealers at below-market levels; indeed, ARCO stations sold gasoline for less than USA and other independents could purchase it at wholesale. (Joint Appendix (hereinafter "JA") 16-18: ¶ ¶ 24, 25, 31). ARCO funded its scheme by manipulating the transfer price of crude oil between its production and refining departments and deliberately underpaying federal windfall profit taxes and state taxes. (JA 18: ¶ 32).

The purpose of ARCO's vertical price-fixing program was to eliminate or weaken the independent marketers which, from ARCO's perspective, provided troublesome price competition for its dealers. (JA 17: ¶ 25). The conspiracy achieved its intended goal. USA and other independents, whose efficiency normally enabled them to underprice ARCO's dealers, found themselves competing with ARCO dealers whose retail prices were in some cases below the prices at which they bought gasoline. As USA's allegations show, the impact of ARCO's program on the inde-

pendent marketing segment was severe: over a dozen independents either sold, liquidated, or cut back their operations in the market affected by the ARCO conspiracy. (JA 15: ¶ 18). At the same time, ARCO rose from being the fourth largest gasoline retailer in California to being the largest. (JA 16: ¶ 22).

ARCO's unlawful conduct had a lasting adverse impact on competition and consumers. Already high entry barriers were raised higher. (JA 15: ¶ 18). Potential entrants became unwilling to tread in a market in which ARCO had repeatedly demonstrated its ability to cripple or destroy competitors which attempted to underprice its dealers. ARCO has disciplined the independent marketers which once put price pressure on ARCO-brand stations. Repeated and sustained doses of subsidized, below-market pricing by ARCO dealers have convinced those SIGMA members which remain in the market that it is folly to try to underprice ARCO's dealers.

SIGMA's interest in this case stems from its recognition that if the Ninth Circuit's decision is reversed, ARCO, and perhaps other major oil companies, will copy ARCO's West Coast vertical price-fixing program to throttle competition from independent marketers in other markets. SIGMA members have no fear of tough competition on the merits, but SIGMA believes, as did the court below, that Congress never intended to allow ARCO to render the efficiencies of SIGMA members irrelevant by fixing and subsidizing artificially low prices for independent ARCO dealers. The injuries suffered by USA as a result of ARCO's unlawful interference with price competition should not go unremedied.

SUMMARY OF THE ARGUMENT

The court below held that the intended victim of a maximum resale price maintenance conspiracy, a competitor of the dealers whose resale prices were fixed at below-market levels, may bring suit under § 4 of the Clayton Act to recover damages for losses attributable to the antitrust violation. The decision below should be affirmed because it vindicates the central policy of § 1 of the Sherman Act and rests on a sound application of this Court's precedents.

1. The fundamental purposes of § 1 of the Sherman Act include assuring that selling prices are determined by market forces and that businesses succeed or fail based solely on their ability to respond to the demands of the market. This Court has held that all forms of conspiratorial interference with the price-setting mechanism of the market, including maximum vertical price fixing, are illegal *per se*, because price fixing of any kind violates the congressionally-mandated policy of competition. ARCO's vertical maximum price fixing required ARCO-brand dealers to charge lower prices than they otherwise could have, and USA's losses were the direct result of this interference with the competitive process. It is fully consistent with the policy of § 1 of the Sherman Act to allow USA to seek damages for its injuries, because they reflect the type of conspiratorial interference with the competitive process which § 1 was intended to prevent.

2. USA was not injured by lawful low pricing, it was injured by unlawfully fixed, below-market prices. ARCO's speculation that USA would have suffered the same losses if its independent dealers had unilaterally, *i.e.*, lawfully, reduced their retail prices is irrelevant. ARCO's logic cannot be accepted because it would deny recovery even to coerced dealers in maximum resale price maintenance cases, as well as to victims of other types of price fixing.

3. Concerted behavior is subjected to stricter antitrust scrutiny than unilateral conduct because conspiracies carry a greater risk of anticompetitive consequences. ARCO's argument that there can be no recovery by a competitor for injuries caused by maximum resale price maintenance, unless the plaintiff also proves the elements of a § 2 monopolization or attempted monopolization claim, is a side-door attack on the *per se* illegality of vertical maximum price fixing. The record refutes ARCO's characterization of its conduct as procompetitive and pro-consumer. ARCO's unlawful scheme has eliminated competitors, weakened the independent marketing segment of the gasoline market, and raised entry barriers, developments which hardly enhance consumer welfare.

ARGUMENT

In enacting the Sherman Act, Congress established competition, unrestricted by private collusion or monopoly, as the central value of our national economic policy:

> The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material

> progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is competition.

Northern Pacific Railway v. United States, 356 U.S. 1, 4 (1958).

The parties in this case define the competition which is protected by § 1 of the Sherman Act in fundamentally different ways. For ARCO, competition means low pricing. Since consumers like low prices, price cutting enhances consumer welfare, and cannot cause antitrust injury, no matter how it comes about. In ARCO's view, as long as a price cut is nonpredatory it makes no difference whether the price was determined unilaterally by the dealer or via a supplier-dealer conspiracy: in either case the price is procompetitive and thus incapable of causing antitrust injury. *See* Brief of Petitioner Atlantic Richfield Company, at 32-37 (hereinafter "ARCO Br.").

USA believes, as did the Ninth Circuit, that Congress had a broader conception of competition when it passed the Sherman Act, seeing it as a process in which the price, output, selection, and quality of goods and services are determined by the unrestrained interaction of manufacturers, distributors, and consumers. This view of competition holds that the right to compete against unilaterally-determined prices, no less than the right to determine one's own prices, is an aspect of the competitive process which Congress intended to protect. *See USA Petroleum Co. v. Atlantic Richfield Co.*, 859 F.2d 687, 693 (9th Cir. 1988). USA argues, and the Ninth Circuit held, that because USA's losses flowed directly from ARCO's unlawful

interference with the price-setting mechanism of the retail gasoline market, it is precisely the type of injury for which Congress intended to provide a private remedy.

SIGMA urges the Court to reject ARCO's narrow view of the aims of § 1 of the Sherman Act. Acceptance of ARCO's position would effectively legalize vertical maximum price fixing and would open the way for ARCO and other manufacturers to use the practice to lessen competition in other markets.

I. USA'S INJURY IS OF THE TYPE SECTION ONE OF THE SHERMAN ACT WAS INTENDED TO PREVENT AND FLOWED FROM THAT WHICH MADE ARCO'S CONDUCT UNLAWFUL

Section 4 of the Clayton Act provides a treble-damages remedy to "any person . . . injured . . . by reason of anything forbidden in the antitrust laws," 15 U.S.C. § 15. This Court has said that the statute's "lack of restrictive language reflects Congress' 'expansive remedial purpose' in enacting § 4: Congress sought to create a private enforcement mechanism that would deter violators and deprive them of the fruits of their illegal actions, and would provide ample compensation to the victims of antitrust violations." *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 472 (1982) (quoting *Pfizer, Inc. v. India*, 434 U.S. 308, 313-14 (1978)). In keeping with the broad congressional purpose, the Court has "refused to engraft artificial limitations on the § 4 remedy." *Id.* at 472.

In *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), the Court held that plaintiffs seeking treble damages under § 4 must show more than "injury causally linked" to an antitrust violation; rather,

"plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful." *Id.* at 489 (emphasis in original). The plaintiffs in *Brunswick* were three bowling centers who alleged that the defendant's acquisition of several bowling centers with whom they competed violated § 7 of the Clayton Act. The plaintiffs claimed that if the defendant had not acquired the bowling centers, they would have gone out of business and the plaintiffs would have enjoyed greater profits. *Id.* at 481. The Court disallowed this claim, holding that the plaintiffs' injury "was not of 'the type that the statute was intended to forestall.' " *Id.* at 487-88, quoting *Wyandotte Co. v. United States*, 389 U.S. 191, 202 (1967). The plaintiffs' claimed injury was unrelated to the policy of § 7, which is to prevent acquisitions that tend to create monopolies; in effect, the plaintiffs sought in damages "the profits they would have realized had competition been reduced." 429 U.S. at 488.

The Court revisited the antitrust injury requirement, again in the context of an alleged violation of § 7, in *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986). Monfort, a beef packer, sought to enjoin another beef packer from acquiring a competitor. One of the threatened injuries alleged by Monfort was "a loss of profits stemming from the possibility that Excel, after the merger, would lower its prices to a level at or only slightly above its costs. . . . " *Id.* at 114. Pointing out that unilateral price cutting, even by a dominant firm, is not unlawful, the Court held that the threat of loss due to possible increased price competition after a merger is not antitrust injury:

"*Brunswick* holds that the antitrust laws do not require the courts to protect small businesses from the loss of profits due to continued competition, but only against the loss of profits from practices forbidden by the antitrust laws." *Id.* at 116.

The *Brunswick* rule requires an examination of "the manner in which the injury alleged reflects Congress' core concerns in prohibiting the antitrust defendant's course of conduct." *McCready*, 457 U.S. at 481. The Ninth Circuit concluded, based on its review of legislative history and this Court's prior price-fixing cases, that Congress prohibited all forms of price fixing in order to insure that "market forces alone determine what goods and services are offered, at what price these goods and services are sold, and whether particular sellers succeed or fail." 859 F.2d at 693. The court below was on firm ground in reaching this conclusion. The price-setting mechanism enjoys special protection not only because price is "the central nervous system of the economy,"[1] but also because of the deeply-held belief that independent entrepreneurs should be allowed to succeed or fail on the basis of their own abilities. *See, e.g., Associated General Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 538 (1983) ("[T]he Sherman Act was enacted to assure consumers the benefits of price competition, and our prior cases have emphasized the central interest in protecting the economic freedom of participants in the relevant market."); *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 348 (1982) ("The *per se* rule 'is grounded on faith in price competition as a market force [and not] on a policy

[1] United States v. Socony-Vacuum Oil, 310 U.S. 150, 224, 226 n.59 (1940).

of low selling prices at the price of eliminating competition.' ") (quoting Rahl, "Price Competition and the Price Fixing Rule—Preface and Perspective," 57 Nw. U. L. Rev. 137, 142 (1962)); *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1972) ("And the freedom guaranteed each and every business, no matter how small, is the freedom to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster."); *Albrecht v. Herald Co.*, 390 U.S. 145, 154 (1968) ("a fixing of prices for resale is conspicuously unreasonable, because of the great leverage that price has over the market") (Douglas, J., concurring).

There is an intimate connection between the injuries claimed by USA and the reasons why ARCO's maximum resale price maintenance scheme is illegal *per se*. USA's allegations establish that its injuries flowed directly from ARCO's interference with the price-setting mechanism of the market, and that these injuries were the intended effects of ARCO's scheme.[2] Prior to ARCO's resale price-fixing campaign, USA and other independents were thorns in ARCO's side because of their ability consistently to undersell ARCO's branded dealers. (JA 14: ¶ 14). Innovative marketing practices and efficiency enabled USA and other independents to provide consumers with a lower-priced alternative to ARCO and the other major oil companies. ARCO's maximum resale price maintenance scheme changed all that. By requiring independent ARCO-brand dealers to sell at below-market

[2] An allegation that the plaintiff was the intended victim of the defendant's antitrust violation, while not controlling, supports the plaintiff's right to bring a treble damages claim under § 4. *Associated General Contractors*, 459 U.S. at 537.

prices and subsidizing those resale prices through various allowances (JA 17-18), ARCO relieved its dealers of competitive pressure from independents such as USA. The prices of ARCO dealers no longer reflected the relative costs and efficiencies of their businesses and the independents'. After ARCO fixed retail prices at levels below the wholesale prices being paid by independents, the independents' efficiencies became meaningless. (JA 18: ¶ 31).

The injuries suffered by USA (and other independents) flowed directly from ARCO's interference with the retail gasoline market's price-setting mechanism. Before ARCO's maximum vertical price fixing program, USA was able to compete profitably. The conspiracy denied USA the opportunity to compete with ARCO dealers on the merits. USA suffered financial losses and was forced to close or sell outlets because it was unable to compete against the artificially low prices of ARCO-brand independent dealers. (JA 18, 20: ¶ ¶ 31, 40). USA's losses directly reflect that which makes ARCO's conduct unlawful: the displacement of market forces by a private agreement on price.

ARCO argues that this case must be decided without considering the policies of § 1 or precedents involving species of price fixing other than maximum resale price maintenance. ARCO Br. 21-26. ARCO parses the language of *Kiefer-Stewart* and *Albrecht*,[3] as if those cases, in establishing the *per se* illegality of vertical maximum price fixing, also established for all time the categories of plaintiffs who may bring suit. ARCO Br. 27-28. ARCO asserts that only the

[3] Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211 (1951); Albrecht v. Herald Co., 390 U.S. 145 (1968).

defendant-manufacturer's dealers may seek damages for injuries caused by maximum resale price maintenance, because those were the only parties whose injuries were discussed in *Kiefer-Stewart* and *Albrecht*. But in *Albrecht*, the Court equated maximum resale price maintenance with price fixing, it did not treat it as an entirely distinct category of conduct. The Court referred to "the long accepted rule in § 1 cases that resale price fixing is a *per se* violation of the law whether done by agreement or combination," and supported its statement with citations to cases involving horizontal, vertical, maximum, and minimum price fixing. *Albrecht*, 390 U.S. at 151-52. The Court went on to discuss the ways in which maximum resale price maintenance harms the manufacturer's dealers, expanding on a similar discussion in *Kiefer-Stewart*. 390 U.S. at 152-53; *see also Kiefer-Stewart*, 340 U.S. at 213. There is no reason to think that this discussion was intended to summarize all the potential anticompetitive consequences of maximum resale price maintenance, much less to limit recovery to a single class of plaintiffs. The plaintiffs in both *Albrecht* and *Kiefer-Stewart* were the defendant's dealers or distributors, thus there was no occasion to discuss the impact of maximum resale price maintenance on other potential plaintiffs.

ARCO also argues that since coercion of the defendant-manufacturer's dealers is what makes maximum resale price maintenance unlawful, only the coerced dealers may sue for damages. ARCO Br. 28. This argument is mistaken for several reasons. First, it assumes that the illegality of vertical price fixing is based solely on the loss of intrabrand competition, when the Court has made clear that the *per se* ille-

gality of vertical price fixing is based largely on the threat to interbrand competition. *Business Electronics Corp. v. Sharp Electronics Corp.*, ___ U.S. ___ , 108 S. Ct. 1515, 1520 (1988). Secondly, it is the existence of an *agreement* which makes vertical price fixing illegal; coercion is simply a surrogate for proof of an explicit agreement. *See Isaksen v. Vermont Castings, Inc.*, 825 F.2d 1158, 1164 (7th Cir. 1987) (agreement may be found if dealer raises prices after receiving threat of reprisal from supplier) (*dictum*), *cert. denied*, ___ U.S. ___ , 108 S. Ct. 1728 (1988). To say that the offense of maximum resale price maintenance requires coercion of dealers is simply to say that the offense, like all § 1 offenses, requires concerted action. It does not resolve the antitrust injury issue.

II. IT IS IRRELEVANT THAT LAWFUL UNILATERAL PRICE CUTTING MIGHT HAVE CAUSED LOSSES SIMILAR TO THOSE CAUSED BY ARCO'S UNLAWFUL CONDUCT

ARCO argues that USA should not be allowed to recover damages for its injuries because it would have suffered the same losses if ARCO's independent branded dealers had unilaterally lowered their prices. ARCO Br. 32-33. Nothing in the record supports the contention that independent ARCO-brand dealers could have or would have charged below-market retail prices, and if that were true there would have been no need for ARCO to engage in unlawful resale price maintenance. In any event, ARCO's point is irrelevant. It is akin to the defendant in an arson case claiming that he should not be held responsible because the building also would have burned down if it had been hit by lightning. ARCO's logic would deny recovery to the victims of any price-fixing conspiracy; for example, coerced dealers would be unable to ob-

tain damages for maximum resale price maintenance because it could be argued that they would have suffered the same injury if other dealers had unilaterally cut their prices. This was apparently the logic employed by the Seventh Circuit in holding that a dealer could not recover for vertical maximum price fixing because its "only harm . . . came from the fact that competing dealers . . . would lower their prices to consumers if [plaintiff] did not." *Jack Walters & Sons Corp. v. Morton Building, Inc.*, 737 F.2d 698, 709 (7th Cir.), *cert. denied*, 469 U.S. 1018 (1984).

The correct response to ARCO's argument is found in decisions such as *Lee-Moore Oil Co. v. Union Oil Co.*, 599 F.2d 1299 (4th Cir. 1979). There, a terminated petroleum products jobber sued its former supplier, claiming that it had been terminated pursuant to a conspiracy among the defendant and other suppliers. The trial court ruled that the plaintiff had not shown antitrust injury because it would have suffered the same injury if it had been lawfully terminated, but the court of appeals, in an opinion by Judge Winter, reversed: "If Lee-Moore can show damages caused by Union's antitrust violation, the fact that Union might have caused the same damages by a lawful cancellation of the contract is irrelevant." *Id.* at 1302.

It is irrelevant that lawful price competition might have caused USA to suffer losses; the conduct which injured USA was not lawful competition. ARCO's argument would deny recovery to most persons and businesses injured by antitrust violations. The Court should reject ARCO's invitation to disembowel § 4 of the Clayton Act.

III. THE NINTH CIRCUIT CORRECTLY HELD THAT USA NEED NOT ALSO PROVE A SECTION TWO VIOLATION IN ORDER TO RECOVER DAMAGES FOR A VIOLATION OF SECTION ONE

ARCO strenuously argues that USA cannot show antitrust injury without establishing the elements of a predatory pricing claim under § 2 of the Sherman Act. It contends that "[v]ertical maximum price fixing can injure consumer welfare and inflict antitrust injury only where the resulting price ceilings pose a dangerous probability of monopoly," ARCO Br. 38, and repeatedly characterizes its own price fixing as procompetitive and consumer welfare-enhancing. *Id.* at 37, 41-45. This is just another way of arguing, contrary to the holdings of *Kiefer-Stewart* and *Albrecht*, that in some circumstances it is lawful to fix maximum resale prices.[4]

The Court has on numerous occasions refused to consider justifications based on the supposed reasonableness of a fixed price. *See Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 351 (1982) ("The anticompetitive potential inherent in all price-fixing agreements justifies their facial invalidation even if procompetitive justifications are offered for some.") (footnote omitted). Moreover, ARCO's effort to engraft a § 2 monopolization analysis onto every claim of maximum resale price maintenance under § 1 ignores the critical differences between single-firm and conspiratorial conduct.

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[4] ARCO's argument mirrors the Seventh Circuit's analysis in Jack Walters & Sons Corp. v. Morton Building, Inc., 737 F.2d 698 (7th Cir.), *cert. denied*, 469 U.S. 1018 (1984). In *Jack Walters* the court of appeals characterized nonpredatory vertical maximum price fixing as "lawful price competition." *Id.* at 709.

Plaintiffs in § 2 predatory pricing cases are required to meet rigorous standards of proof because there is a strong presumption that single-firm price cutting is legitimate and procompetitive. *See Northeastern Telephone & Telegraph Co. v. AT&T*, 651 F.2d 76, 88 (2d Cir. 1981) (in § 2 predatory pricing case, court must not "chill the very behavior the antitrust laws seek to promote"), *cert. denied*, 455 U.S. 943 (1982). Conspiratorial conduct and, in particular, price fixing, is not entitled to the presumption of legality accorded single-firm behavior. Concerted restraints on price and other aspects of competition are hardly every procompetitive and consequently are judged far more harshly than single-firm activities. The reasons for the distinct legal treatment of single-firm and concerted conduct were discussed recently in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984):

> The reason Congress treated concerted behavior more strictly than unilateral behavior is readily appreciated. Concerted activity inherently is fraught with anticompetitive risk. It deprives the marketplace of the independent centers of decisionmaking that competition assumes and demands. In any conspiracy, two or more entities that previously pursued their own interests separately are combining to act as one for their common benefit. This not only reduces the diverse directions in which economic power is aimed but suddenly increases the economic power moving in one particular direction. Of course, such mergers of resources may well lead to efficiencies that benefit consumers, but their anticompetitive potential is sufficient to warrant scrutiny even in the absence of incipient monopoly.

Id. at 768-69.

The anticompetitive potential inherent in all forms of price fixing has been realized in this case. More than a dozen independent marketers have either left the market or curtailed their operations, and barriers to entry have been increased, as a result of ARCO's vertical price-fixing program. (JA 15: ¶ 18). ARCO's conduct has weakened the remaining independents and impaired their ability to compete. (JA 16, 20: ¶ ¶ 20, 39). Price competition in the western United States, once robust, has been chilled. SIGMA members have learned from bitter experience that it is fruitless to attempt to underprice ARCO-brand dealers because ARCO responds with prices that are below the independent's costs until the chastened competitor raises its prices to the higher levels favored by ARCO and the other major oil companies. As a result of ARCO's unlawful practice, competitors have been weakened or eliminated, and consumers face higher prices and have fewer choices. Surely Congress did not intend that a conspiracy with such effects cannot support a damage claim until the party which organized the conspiracy nears monopoly power.

In arguing that only predatory maximum resale price maintenance can injure consumers and cause antitrust injury, ARCO relies heavily on this Court's decisions in *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986) and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). This reliance is misplaced. Only *Cargill* was an antitrust injury case, and neither case involved an allegation of injury caused by vertical price fixing. In

Cargill, the Court rejected the argument that a threat of low pricing by a firm after a merger constituted potential antitrust injury. The Court emphasized that it is perfectly lawful for a company to engage in nonpredatory price cutting. 479 U.S. at 116. The Court's discussion of the prerequisites for a predatory pricing claim, cited by ARCO (ARCO Br. 38-39), was limited to the context of unilateral price cutting, a practice that is reachable only under § 2 of the Sherman Act. The Court's comments about the need to analyze predatory pricing claims carefully must be read in light of the strong policy favoring single-firm price cutting, which is the essence of competition. *See* 479 U.S. at 122 n.17. Though the Court had no occasion in *Cargill* to address the issue raised in this case, its discussion of *Brunswick*'s antitrust injury rule supports USA's position: "*Brunswick* holds that the antitrust laws do not require the courts to protect small businesses from the loss of profits due to continued competition, but only against the loss of profits from practices forbidden by the antitrust laws." *Id.* at 116. Here, USA was injured by an unlawful practice, not by lawful price competition.

The question in *Matsushita* was whether there was a genuine issue of material fact as to whether the plaintiffs had suffered cognizable antitrust injury. The plaintiffs had alleged several conspiracies, none of them a maximum resale price maintenance conspiracy. The Court held that of the conspiracies alleged, the only one which could cause antitrust injury was "the alleged conspiracy to monopolize the American market through predatory pricing. . . . " 475 U.S. at 586. Nowhere did the Court suggest that only type of price-fixing conspiracy which can cause antitrust

injury to competitors is a predatory pricing conspiracy. In fact, its description of the types of conspiracies which might have caused injury to the plaintiffs indicated that an allegation of predatory pricing is not required:

> For purposes of this case, it is enough to note that respondents have not suffered an antitrust injury unless petitioners conspired to drive respondents out of the relevant markets by (i) pricing below the level necessary to sell their products, or (ii) pricing below some appropriate measure of cost. . . . Respondents therefore may not complain of conspiracies that, for example, set maximum prices above market levels, or that set minimum prices at any level.

475 U.S. at 584 n.8. Here, USA alleges that that the prices fixed by ARCO were artificially low, *i.e.*, below market levels.

This Court should reject ARCO's effort to superimpose the stringent requirements of a § 2 predatory pricing claim on USA's § 1 claim. Acceptance of ARCO's position would erode the congressionally-drawn distinction between unilateral and concerted conduct and would greatly weaken private enforcement of § 1.

CONCLUSION

SIGMA respectfully urges the Court to affirm the decision of the Ninth Circuit.

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Dated: September 20, 1989

AMICUS CURIAE

BRIEF

(1)

No. 88-1668

In The

Supreme Court of the United States

October Term, 1989

ATLANTIC RICHFIELD COMPANY,

Petitioner,

v.

USA PETROLEUM COMPANY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF AMICI CURIAE SUBMITTED BY THE STATES OF CALIFORNIA, ALASKA, HAWAII, IOWA, LOUISIANA, NEBRASKA, NEVADA, OREGON, PENNSYLVANIA, TENNESSEE, AND UTAH IN SUPPORT OF RESPONDENT

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INTRODUCTION

The States of California, Alaska, Hawaii, Iowa, Louisiana, Nebraska, Nevada, Oregon, Pennsylvania, Tennessee, and Utah (hereinafter "Amici States") submit this brief in support of the respondent USA Petroleum (hereinafter "USA"). The decision of the Ninth Circuit in *USA Petroleum Company v. Atlantic Richfield Company*, 859 F.2d 687 (9th Cir. 1988), should be affirmed.

INTERESTS OF THE AMICI STATES

The Amici States, through their respective Attorneys General, perform two basic functions in relation to the antitrust issues before the Court in this case. Attorneys General enforce the antitrust laws with respect to anticompetitive matters occurring within or impacting upon their states. They also represent public agencies at the state and local levels, as well as consumers *parens patriae*, as purchasers who may have been injured as a result of antitrust violations.

The Amici States have an interest arising from both such functions in promoting a rational and coherent body of federal antitrust law. The States have the additional interest, arising from their on-going protective obligations toward consumers and public agency purchasers, of promoting prices in the marketplace reflective of sustained competition on a long-run basis. To the extent promotion of either or both of such interests is dependent upon the viability of individual firms as competitors, the states have an indirect interest in promoting such an objective as well.

The Amici States, furthermore, have an interest in preventing use of the "antitrust injury" doctrine as a device for indirectly changing the *per se* rule or any other substantive rule of antitrust law. The Amici States are also vitally concerned that the doctrine not become an instrument for the insulation from the antitrust laws of collusive conduct that may ultimately result in the artificial inflation of prices. Any changes in the *per se* or other substantive rules of antitrust law should be based on reasoning consistent with previously established Congressional goals and sound public policy.

The Amici States thus support the position of respondent USA Petroleum (USA) that its Sherman Act Section 1 claim is not barred by the antitrust injury doctrine. The States' support is premised upon USA's allegations that petitioner Atlantic Richfield Company (hereinafter "ARCO") combined and conspired with its dealers to engage in maximum vertical price fixing to set prices at "below market" levels; that both the intended and actual impact of ARCO's illegal pricing scheme was upon the independent sector of the retail gasoline market, of which USA is a member; that such sector had been a source of price competition prior to onset of the scheme; and that USA has suffered financial losses and was being driven out of the market as a result of ARCO's scheme.

SUMMARY OF ARGUMENT

1. This case comes before the Court as one in which respondent has assumedly satisfied those basic elements

in a maximum vertical price-fixing case having any possible relevance to the question of antitrust injury (to wit. violation, causation, and standing),[1] other than, of course, that part of the standing element consisting of the antitrust injury requirement itself.[2] ARCO seeks to avoid liability on the sole ground that, absent proof of predatory pricing levels, USA did not suffer antitrust injury as a result of the alleged price-fixing scheme. Satisfaction of the aforesaid basic elements in accordance with, and based upon, the specific allegations in this case, however, negates any significant possibility that a legitimate issue of antitrust injury can be raised in this case.

2. ARCO, unable to avoid liability through proper interpretation and application of the antitrust injury doctrine, resorts to manipulation of that requirement as a means to revise the substantive rules properly applicable to its case. ARCO impliedly concedes the very issue it attempts to raise when it acknowledges that the antitrust injury doctrine would be no defense if the prices causing USA's injury had been both collusively low and "predatory," rather than merely collusively low. The nature of and reasons for USA's injury are wholly unaffected by the

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[1] The fourth basic element, amount of damages, has no possible bearing upon the question of antitrust injury because it does not address the nature of the injury suffered.

[2] All references in this brief to the "standing" element, or to the "standing" doctrine, means such element or doctrine in its traditional sense apart from the antitrust injury requirement. Amici States do not quarrel, however, with this Court's previous statement that the antitrust injury requirement is part of the standing doctrine, *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 110 n.5 (1986).

circumstance on which ARCO would have application of the doctrine turn. Even by defendant's own argument, the only difference between prices that are collusively low and those that are both collusively low and predatory lies in the nature of the impact each may have upon consumers.

The impact of an antitrust defendant's conduct upon consumers is irrelevant as to whether a plaintiff competitor suffered antitrust injury. ARCO, rather than seeking the appropriate application of the antitrust injury doctrine, entreats this Court to approve the use of the doctrine as a mechanism for indirectly changing the substantive rules of standing applicable to antitrust cases, as well as those pertaining to *per se* illegality.

3. In urging this Court to change indirectly, rather than through open discussion, basic rules of antitrust pertaining to both standing and *per se* illegality, ARCO is compelled to ignore, distort or nullify a number of established antitrust precepts underlying those rules. ARCO relies on a definition of competition inimical to basic antitrust concepts, and ignores the prior decisions of this Court as well as specific legislative history of the Sherman Act discussing the anti-competitive nature of collusively low prices. ARCO also erroneously assumes the antitrust laws promote below competitive level prices for the short run benefit of consumers, ignores the economic reality, reflected in legislative history, prior decisions of this Court and in the allegations in this very case, that the

benefit to consumers derived from collusively low prices is likely in the long run to result in reduced levels of price competition.[3]

ARGUMENT

I

THERE IS NO SIGNIFICANT POSSIBILITY THAT A LEGITIMATE ISSUE OF ANTITRUST INJURY CAN BE RAISED ON THE ASSUMED FACTS OF THIS CASE

A. This Case Comes Before the Court As One In Which The Basic Elements Of A Vertical Price-Fixing Case Are Satisfied.

The District Court granted ARCO's motion for summary judgment on the sole basis that, absent proof of predatory pricing levels, USA suffered no antitrust injury. The effect of the ruling is that USA is barred from recovery because it lacks standing, not for established reasons historically linked to that requirement in price-fixing cases, but for reasons limited strictly to the doctrine of antitrust injury. See *Cargill*, 479 U.S. 104 at 110 n.5.

[3] This brief thus asserts certain themes consonant with those relied on by the majority in the Ninth Circuit below, relating to the relationship between the particular illegal conduct alleged here and price-fixing generally under the antitrust laws. It does so, however, only after challenging the assumption, made *sub silentio* by the Ninth Circuit, to the effect that petitioner has raised a legitimate antitrust injury issue. Amici submit that petitioner has failed to raise such an issue, and that, instead, petitioner urges this Court to misuse the antitrust injury doctrine to change the substantive rules of law applicable to its case.

Where, as here, the District Court has granted summary judgment against plaintiff on a point of law, after accepting plaintiff's allegations as true, this Court must also accept those allegations as true. It is irrelevant that defendant may have denied plaintiff's allegations or offered counter-allegations. See, *Bishop v. Wood*, 426 U.S. 341, 347 (1976); *Baker v. Department of Navy*, 814 F.2d 1381, 1382 (9th Cir. 1987).

Thus, the following relevant allegations by USA must be taken as true: (a) USA lost sales and profits as a result of direct competition with ARCO's collusively low prices, (b) the collusively low prices were fixed at "below market" levels, (c) USA was a direct target of ARCO's violation, (d) ARCO and its dealers formed both a combination based on coercion and a conspiracy based on voluntary agreement in violation of Section 1, and (e) the purpose of ARCO's price-fixing scheme was to cripple or eliminate the independent sector of the retail gasoline market of which USA was a member.

The District Court below, moreover, expressly stated in its ruling granting summary judgment, that USA could prove a *per se* illegal price fix (Pet. App. B, ¶ 5.), found expressly in connection with a matter not now before the Court that USA had standing, *USA Petroleum Co. v. Atlantic Richfield Co.*, 577 F.Supp. 1296, 1302 (C.D. Cal. 1983), and necessarily based its summary judgment ruling on the assumption that USA could show causation in fact.[4]

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[4] Satisfaction of the causation, or injury-in-fact, requirement is implicit in the Court's ruling on antitrust injury, because there is no need to address an antitrust injury question until the injury-in-fact requirement is first addressed and satisfied.

ARCO furthermore makes an implied but significant concession of antitrust injury when it concedes USA would suffer antitrust injury in the event the prices it fixed were "predatory" as well as collusively low.

The Amici States submit that the above allegations in support of the assumedly satisfied elements of violation, causation and standing, effectively eliminate any possible ambiguity over whether the alleged injury suffered in this case was of an antitrust nature.

B. This Case Does Not Present Any Usual Or Familiar Grounds For Raising Questions of Antitrust Injury.

1. The Doctrine

The antitrust injury doctrine assumes that USA can show it was injured "by reason of" an antitrust violation as required by Section 4 of the Clayton Act. The doctrine then addresses the nature of the assumed injury, and requires that:

> "[the] injury be 'of the type the antitrust laws were intended to prevent and that flows from that which makes the defendant's acts unlawful. The injury should reflect the anticompetitive effect of the violation. . . . It should, in short, be 'the type of loss that the claimed violations . . . would be likely to cause.' [cite]" *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977)

The doctrine thus calls initially for an inquiry in which the reasons for the illegality of the conduct are

determined and the likely effects thereof explored. The doctrine then focuses on the extent to which the injuries suffered by the particular claimant before the court are consistent with such reasons and such effects.

The doctrine serves the overall purpose of ensuring that the specific claim before the court is not "inimical" to the antitrust laws. 429 U.S. at 489. Satisfaction of the basic elements of violation, causation and standing on the basis of the allegations in this case, however, effectively eliminates any risk that the particular claims before the court may be "inimical" to the antitrust laws.

2. Price-Fixing

The possible bases, in general terms, on which the defense of lack of antitrust injury might be found in any Clayton Act Section 4 case would appear to be both discrete in nature and finite in number. Those bases that might be generally available in any case would appear to be equally available in a case, as here, of *per se* illegal price-fixing, with one notable exception. The exception occurs with respect to the possibility of showing plaintiff's alleged injury is traceable to pro-rather than anti-competitive effects of the alleged violation. *Cargill*, 479 U.S. at 116; *Brunswick*, 429 U.S. at 488. The reason for the exception is that where *per se* illegal price-fixing is established, defendant should be precluded as a matter of law from attempting to show that the violation nevertheless

had significant "pro-competitive" benefits. *Continental T.V. Inc. v. G.T.E. Sylvania, Inc.*, 433 U.S. 36, 50 n.16 (1977).

Price fixing, regardless of its form or the precise business context in which it may occur, is thus condemned as "*per se*" illegal, (*United States v. Socony Vacuum Oil Co.*, 310 U.S. 150, 221 (1940)), except in those rare instances where it is a necessary part of a competitive undertaking. *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 24 (1979). This Court has declared it to be illegal *per se* because it is considered to have a "pernicious effect on competition . . . [without] redeeming virtue." *Northern Pacific R. Co. v. United States*, 356 U.S. 1, 5 (1958). The law does not recognize the possibility that a naked price fix, horizontal or vertical, may have pro-competitive purposes or effects, and consequently "does not permit an inquiry into [its] reasonableness." *Socony Vacuum*, 310 U.S. at 226 n.59, quoted in *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 351 n.23 (1982). See also, *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927); *Continental T.V. Inc. v. G.T.E. Sylvania, Inc.*, 433 U.S. 36, 50 n.16 (1976); *Albrecht v. Herald Co.*, 390 U.S. 145, 152-53 (1968).[5]

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[5] This court has recognized that there may be individual cases of *per se* illegality that do not fit the generalizations on which the rule is based; but it has never recognized the possibility, without at the same time eliminating the rule, that an entire type of *per se* illegal conduct may have significant procompetitive consequences. *Sylvania*, 433 U.S. at 50 n.16.

An antitrust defendant thus faced with a claim of *per se* illegal price-fixing, which also satisfies the violation, causation and standing requirements for such a cause of action, faces almost certain recovery against it, unless it is able to raise a legitimate issue under the antitrust injury doctrine. Amici submit that this case does not admit of that possibility.

3. Preclusion Of Pro-Competitive Effect/Antitrust Benefit.

The most familiar application of the antitrust injury doctrine lies in the area of pro-competitive effect. If plaintiff's injury is traceable to a pro-competitive effect of defendant's violation, defendant may legitimately invoke the doctrine and contend that plaintiff suffered no antitrust injury. *Brunswick*, 429 U.S. at 489; *Cargill*, 479 U.S. at 115. That possibility is not open to ARCO, however, because, based on the *per se* illegality of its violation, as assumed by the District Court, it is legally foreclosed from postulating any pro-competitive effect flowing from its conduct.[6]

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[6] *Brunswick* and *Cargill* are distinguishable. In *Cargill* and *Brunswick* the alleged violation was a merger or acquisition. Mergers are not *per se* illegal; the impact they may have upon the market may be either pro- or anti-competitive. Furthermore, as the 9th Circuit pointed out below, in both *Cargill* and *Brunswick*, the injury occurred because of pricing practices which were themselves legal.

To whatever extent ARCO might nevertheless be successful in raising an issue of pro-competitive purpose or effect, the *per se* rule of illegality is to that extent undermined and weakened. The argument necessarily would be contrary to the

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A second possible basis, for raising an antitrust injury issue, related to that of pro-competitive effect, would appear to be unavailable to ARCO because of USA's satisfaction of the injury-in-fact element of its case. ARCO is precluded from arguing that USA was benefitted rather than injured by reason of ARCO's violation. See *Matsushita Electronic Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 584-85 n.8 (1986).

Any remaining possibilities for legitimately invoking the doctrine would seem necessarily to relate to proving contentions that USA's injury is of a type that is either of neutral concern under the antitrust laws, *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 264 (1972), or, even if of a type that merits concern, is nevertheless one beyond the scope of those laws for reasons of remoteness. Neither of these possibilities appears realistically open to ARCO.

4. Preclusion of Antitrust Neutrality/Remoteness.

USA is not seeking recovery for injuries that are somehow of neutral concern under the antitrust laws.[7]

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purpose of the *per se* rule. Such an argument runs counter, as well, to the allegations in this case, which must be taken as true on appeal, that the intended effect of ARCO's scheme was to cripple or destroy a whole segment of competitors in the marketplace.

[7] USA does not seek recovery, for instance, for environmental or aesthetic losses, or for any other form of loss of neutral concern under the antitrust laws. See *In re Multidistrict Vehicle Air Pollution*, 481 F.2d 122, 126 (9th Cir. 1973), *cert.*

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It seeks recovery for lost sales and profits suffered as a competitor in the marketplace. USA's alleged injury is a classic form of injury under the antitrust laws. See e.g., *Betaseed, Inc. v. U and I. Inc.*, 681 F.2d 1203, 1220-21 (9th Cir. 1982) (competitor may have valid claim for lost sales and profits resulting from defendant's tying or reciprocal dealing.)

Indeed, ARCO's argument that USA suffers antitrust injury only when the prices are fixed at "predatory" levels impliedly concedes the very point. The character of and reasons for respondent USA's injury are wholly unaffected by whether the prices causing the injury are simply collusively low or whether they are both collusively low and "predatory."[8]

The only remaining possibility for invoking the antitrust injury doctrine here is that relating to contentions of remoteness. Such a possibility on its face is tenuous at best, however, since remoteness and other similar factors logically relate more to traditional elements of the "standing" doctrine than to that of antitrust injury. In any case,

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denied sub nom. Morgan v. Automobile Mfg. Assoc., 414 U.S. 1045 (1973), citing *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 264 (1972); *Association of General Contractors v. California State Council of Carpenters*, 459 U.S. 519, 539 (1982) ("It is not clear whether the Union's interests would be served or disserved by enhanced competition in the market."). Cf. *Newman v. Universal Pictures*, 813 F.2d 1519, 1523 (9th Cir. 1987).

[8] The amount of USA's damages is likely to be affected by the precise level of the fixed prices; however, the amount of a plaintiff's damages is irrelevant to the antitrust injury requirement.

while USA's claim may arguably be in some sense "indirect," it is not indirect under either traditional standing rules or the antitrust injury doctrine.

USA's claims should be considered direct rather than indirect to the extent its injury resulted from collusion in the form of voluntary agreement between ARCO and its dealers. To the extent the dealers willingly cooperated in the scheme unaffected by coercion, there would be no intermediate victims between the contestants. To the extent dealers were instead coerced, those dealers might have a claim based on their loss of freedom as independent marketers, *Albrecht v. Herald Co.*, 390 U.S. at 152; *Kiefer-Stewart Co. v. Seagram & Sons, Inc.*, 340 U.S. 211, 213 (1951), thereby arguably rendering respondent's claim indirect in relation to ARCO.

Any argument to the effect that USA's claim is defective based on indirectness, however, would seem to rest on "formalistic line drawing" rather than on substantive analysis. *Sylvania*, 433 U.S. at 59. While admittedly not sufficient by itself to negate remoteness, it is nevertheless not without significance that USA has alleged it was the immediate target of ARCO's illegal behavior. *Association of General Contractors v. California State Council of Carpenters*, 459 U.S. 519, 542 (1983).[9] The allegation is buttressed

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[9] ARCO made no counter-allegations to the effect that the target of its scheme was its own dealers based on a possible desire to control high prices or curb excessive profits. Such a contention, even if made, would be of no legal significance because USA's allegations must be taken as true for purposes of this appeal.

by the additional circumstance that USA's claims are "inextricably intertwined" with any potential claims by ARCO's dealers. *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 484 (1982). The two types of claims are intertwined, initially, because any conclusion to the contrary must turn on the artificial distinction between a conspiracy and a combination formed through coercion. Such a distinction would be "inimical" to the antitrust laws. *Albrecht*, 390 U.S. at 151 (there is a " . . . long accepted rule in § 1 cases that resale price fixing is a *per se* violation of the law whether done by agreement or combination"); *U.S. v. Parke, Davis & Co.*, 362 U.S. 29, 44 (1960).

Competitor and dealer claims are intertwined for the additional reason that each is likely to rest on the same contentions of lost sales and profits. Their closeness is dramatically shown in *Albrecht*. Plaintiff in that case was a coerced, but non-complying, dealer who claimed injury, not as a coerced but non-complying dealer, but as a competitor of compliant dealers to whom it lost sales and profits. 390 U.S. at 147-48. It simply would make no antitrust sense to distinguish between the claims of coerced dealers and the claims of those with whom they compete based on either the nature of their claims or their remoteness from the wrongdoer.

There would appear to be no room for genuine argument in this case that USA suffered no antitrust injury. The antitrust nature of USA's injuries would appear established without the need directly to invoke the doctrine. Because there is no apparent need or room for

argument based on the doctrine in this case, its application realistically can have no effect unless it is misconstrued or misapplied or both. Petitioner invites the Court to do both.

II

ARCO MISCONSTRUES THE ANTITRUST INJURY DOCTRINE AS A LICENSE FOR REVISION OF THE SUBSTANTIVE LAW OF ANTITRUST

ARCO makes two apparent arguments with respect to antitrust injury. It contends that, absent predatory pricing, USA's lost sales and profits resulting from its having to compete with the collusively low prices of ARCO's branded dealers do not constitute antitrust injury. It contends, secondly, that even if USA suffered otherwise cognizable antitrust injury, its injury is outweighed by the benefit to consumers from low prices.

ARCO supports its first contention by arguing, based on the rationales for *per se* illegality discussed in the *Kiefer-Stewart* and *Albrecht* decisions, that the only possible antitrust injury resulting from maximum vertical price-fixing relates to the loss of freedom suffered by coerced dealers. ARCO professes to be making an argument of antitrust injury. In reality it is making a "standing" argument having nothing to do with antitrust injury, because implicit in its argument is a concession that plaintiff does suffer antitrust injury when prices are at a "predatory" level. Since the nature of and reasons for USA's alleged injury are the same regardless of the precise level of the fixed prices, defendant is necessarily

basing its argument on something other than the antitrust injury doctrine. That "something other," while not articulated, is necessarily related to some aspect of the standing doctrine apart from antitrust injury.

ARCO fails to discuss or even mention, however, any of the traditional rules of standing, and thus it completely fails to reconcile its contention with any principles associated with that doctrine. ARCO's contention cannot be reconciled with principles of standing previously established by this Court. (See I, B, 4, *supra*.) Thus, ARCO in effect invites the Court to use the antitrust injury doctrine to nullify important principles pertaining to substantive rules of standing.

ARCO takes a similar approach with respect to its second contention. Its second contention is in the classic mold of a rule of reason analysis designed to determine whether on balance a particular practice should be considered an unreasonable restraint of trade. ARCO posits a pro-competitive benefit to consumers, and argues that it outweighs any arguable anti-competitive effect upon competitors. See *Continental T.V., Inc. v. G.T.E. Sylvania, Inc.*, 433 U.S. 36, 50 n.16 (1977) ("the probability that anti-competitive consequences will result . . . and the severity of those consequences must be balanced against its pro-competitive consequences"). ARCO thus again would use the antitrust injury doctrine as a license to change a substantive rule of antitrust. Without the slightest acknowledgment, ARCO seeks to convert a *per se* offense to one governed by the rule of reason.

In so using the antitrust injury doctrine, ARCO has ignored both its legal definition and its fundamental purposes. The doctrine, by its terms, simply addresses whether the particular claimant before the Court, on balance, suffered antitrust injury. It does not address, as would the rule of reason, whether the antitrust injury suffered by the particular claimant is outweighed by pro-competitive benefit bestowed on others. If ARCO's tactics are successful, no rule of substantive law, including any rule of *per se* illegality, would be free from the threat of revision or elimination through misuse of the antitrust injury doctrine.

Amici States urge this Court to reject ARCO's invitation to misuse of the antitrust injury doctrine.

III

PRICES FIXED AT "BELOW-MARKET" LEVELS ARE ESSENTIALLY ANTI-COMPETITIVE IN BOTH THE SHORT AND THE LONG RUN

ARCO, as shown, seeks to use the antitrust injury doctrine as a means of injecting a full-blown rule of reason analysis into a case of *per se* illegality. It does so in an attempt to defeat a targeted victim's right of recovery as an injured competitor based on postulation of an offsetting pro-competitive benefit conferred upon consumers. Application of fundamental antitrust precepts demonstrates that ARCO's alleged scheme should be regarded as anti-rather than pro-competitive.

A. ARCO Adopts An Erroneous View Of Competition Inimical To The Antitrust Laws.

ARCO promotes a layman's simplistic view of competition by reducing it to a mere matter of low prices. It implies that price fixing and competition are compatible concepts.

This Court has stressed on numerous occasions, however, that, "The essence of the antitrust laws is to ensure fair price competition in an open market." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 342 (1979). Those laws are *not* founded " 'on a policy of low selling prices at the price of eliminating competition.' " *Arizona v. Maricopa County Medical Society*, 457 U.S. at 348. Price fixing and competition are incompatible, mutually exclusive concepts. *Northern Pacific R. Co. v. United States*, 356 U.S. at 5; *United States v. Socony Vacuum Co.*, 310 U.S. at 221; *United States v. Trenton Potteries Co.*, 273 U.S. at 396-401. The Ninth Circuit majority below articulated the historically correct concept of competition under the antitrust laws as the major premise of its decision, as follows: "Price-fixing of any kind distorts in a basic way the competitive process the antitrust laws were meant to protect." 859 F.2d at 692.

USA should be entitled to compete in a free and open market as much as a consumer is entitled to purchase in such a market. As the Ninth Circuit below remarked, USA is entitled to play on an "even playing field" 859 F.2d at 697. See also *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948) ("statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers"). See also 859 F.2d at 693.

B. It Is Irrelevant Under The Antitrust Laws Whether Prices Are Raised, Lowered, Or Unaffected By Reason Of A Naked Restraint Of Trade.

This Court long ago rejected "reasonableness of prices" as a defense to price fixing. The Court reasoned that, "Congress has not left with us the determination of whether or not particular price-fixing schemes are wise or unwise, healthy or destructive." *United States v. Socony Vacuum Oil Co.*, 310 U.S. at 221.

A corollary is that the law condemns with equal force both high and low prices resulting from such a restraint. Each has equal potential for anti-competitive effect. *United States v. Trenton Potteries Co.*, 273 U.S. at 395 (irrelevant "whether prices were actually lowered or raised"); *United States v. Trans-Missouri Freight Assn*, 166 U.S. 290, 324 (1890) (contracts in restraint of trade to raise or reduce prices "are nevertheless of the same nature and kind; and . . . do not so far differ . . . that they may not all be treated alike and . . . condemned in common"). See also, *Arizona v. Maricopa County Medical Society*, 457 U.S. at 348.

This court has been resolute in applying the above precepts in the vertical as well as horizonal context. Vertical combinations to lower prices are condemned because they interfere with the free play of market forces "[e]ven

when they operate . . . temporarily to stimulate competition." *Kiefer-Stewart Co.*, 340 U.S. at 213. Accord *Albrecht*, 390 U.S. at 151.[10]

There is significant support in legislative history for the historical indifference shown by this Court to the level of prices resulting from a naked price fix. Senator Sherman condemned the trusts because "they operate with a double-edged sword." The two cutting edges of which he spoke were those of high prices to consumers and low prices to suppliers. 21 Cong. Rec. 2421 (1890).

Representative Culberson, the House leader in charge of debate on the Sherman Act bill, in a discussion of collusively low prices in the context of vertical restraints under Section 1, gave an account of practices by Standard Oil strikingly similar to those alleged here. Culberson made no mention of Section 2, or of any need to meet its requirements before opining that the collusively low prices were a restraint of trade under Section 1. 21 Cong. Rec. 4089 (1890).

C. The Antitrust Laws Do Not Now, And Never Have, Promoted Below Competitive Level Prices For The Benefit of Consumers.

ARCO's defense rests clearly on a non-purpose of the antitrust laws. There is no legislative history, and there are no cases, indicating that it has ever been a purpose of

[10] This Court has condemned, on the basis of similar principles, a naked restraint in the form of boycott having no alleged impact whatever on the level of prices. *Klors v. Broadway Hale Stores, Inc.*, 359 U.S. 207 (1959).

the antitrust laws to bestow the benefit of below competitive level prices upon consumers. Lande, "Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged") 34 Hast. L.J. 67, 105 (1982).[11]

Consumers are indeed the primarily protected class of potential victims under the antitrust laws. *Reiter v. Sonotone Corp.*, 472 U.S. at 343. That does not mean, however, that consumers are the only class of protected victims. The antitrust laws should not be reduced to the mere enactment of any particular economic theory, or brand of legal persuasion related thereto. See *Lochner v. New York*, 198 U.S. 45, 75 (1905) ("Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics") (J. Holmes, dissenting).

D. Any Benefit To Consumers From Collusively Low Prices Is Likely To Be Ephemeral In Any Case.

Consumer pocketbooks may benefit in the short run from collusively low prices, but are likely to suffer in the long run. Collusively low prices, assuming their existence can be established, *Matsushita*, 475 U.S. at 586, may result, as is alleged here, in the elimination of a source of price competition. See *United States v. Trans-Missouri Freight Assn*, 166 U.S. at 323-24 (artificially reduced prices "might

[11] To the extent "below market" prices might translate to prices nevertheless above the competitive level, there is no suggestion in the cases or legislative history that the antitrust laws promote collusion as a response to artificially high prices.

be dearly paid for by the ruin of such a class (smaller dealers)"). See also *Fashion Originators Guild of America, Inc. v. F.T.C.*, 312 U.S. 457, 467 (1941); *Standard Oil Co. v. United States*, 221 U.S. at 76-77, 83.

USA has alleged both that the independent sector of the gasoline retail market has traditionally been a source of price competition, and that its existence has been threatened, to the ultimate disadvantage of competition and consumers. Under the rules of summary judgment, this Court must accept the allegations as true, as well as the inescapable implication to be drawn from them that any benefit to consumers from ARCO's acts is likely to be ephemeral.

E. The Line Between Collusively High And Low Prices Is Easily Crossed.

This Court has long recognized that, "The reasonable price fixed today may . . . become the unreasonable price of tomorrow." *United States v. Trenton Potteries*, 273 U.S. at 397. See also *United States v. Socony Vacuum*, 310 U.S. at 221 ("The reasonableness of prices has no constancy due to the dynamic quality of business facts underlying price structures.") There is no reason to believe that prices in the retail gasoline market are an exception. To promote a rule under which the effective lawfulness of a price-fix as to any particular claimant turns on the level of the prices fixed is to resort to a standard which is not only irrelevant, but unworkable as well.

CONCLUSION

The decision of the Court of Appeals should be affirmed.

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Respectfully submitted,

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